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BEFORE THE

SURFACE TRANSPORTATION BOARD

Ex Parte No. 705

COMPETITION IN THE RAILROAD INDUSTRY

COMMENTS OF

THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

The National Industrial Transportation League ("League") hereby submits its Comments in response to the Notice of the Surface Transportation Board ("STB" or "Board") served on January 11, 2011, as modified by decision served on February 4, 2011. In the Notice, the Board announced that it will hold a public hearing on June 22 "to explore the current state of competition in the rail industry and possible policy alternatives to facilitate more competition, where appropriate."[1] In its Notice, the Board recognized that its existing competition policies have not been reviewed recently, and that now is an appropriate time to evaluate whether such policies have become outdated or ineffective based on the current rail market. Specifically, the Board requests views on what measures it can and should consider to modify its competitive access policies based on the very substantial changes that have occurred in the rail industry since adoption of the Staggers Act more than 30 years ago. The Board also seeks input on the impact of such policy changes.

I. INTRODUCTION

At the heart of this proceeding is whether the Board's current policies satisfy the fundamental pro-competitive mandate of the Staggers Act "to allow, to the *maximum extent*

[1] *Competition in the Rail Industry*, STB Docket No. EP 705 (served Jan. 11, 2011) [hereinafter "STB Notice"].

possible, competition and the demand for services to establish reasonable rates for transportation by rail;"[2] or whether they have tipped too far in the railroads' favor by promoting railroad revenue, without preserving or encouraging adequate competition between railroads. The League commends the Board for initiating this proceeding, which involves the most critical issues confronted by rail-dependent businesses whose facilities lack competitive rail service. Captive shippers whose businesses rely on efficient and cost-effective transportation require competitive rail service to maintain their own competitiveness in today's global economy. The ability for U.S. companies to compete effectively with foreign competition has a direct impact on keeping manufacturing and production facilities in the United States, which, in turn, impacts American jobs.

The Board has requested comments in advance of the hearing that address certain legal, factual and policy issues regarding: (1) the financial state of the rail industry; (2) alternative through routes; (3) terminal access; (4) reciprocal switching; (5) bottleneck rates; (6) access pricing standards; and (7) the impacts of any proposed change upon the rail industry, the shipper community, and the economy as a whole.[3] In addition to filing these individual comments, the League has joined several other shipper organizations in comments being submitted to the Board as "Interested Parties."[4] The Interested Parties' comments address in detail the legal and technical issues raised in the Board's Notice, as well as the strong financial state of the rail

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[2] 49 U.S.C. § 10101(1) (emphasis added).
[3] STB Notice at 5.
[4] Joint Comments of Alliance For Rail Competition, The American Chemistry Council, American Forest And Paper Association, American Public Power Association, The Chlorine Institute, Colorado Wheat Administrative Committee, Consumers United For Rail Equity, Edison Electric Institute, Glass Producers Transportation Council, Idaho Barley Commission, Idaho Wheat Commission, Kansas Wheat Commission, Large Public Power Council, Montana Farmers Union, Montana Wheat & Barley Committee, National Grain And Feed Association, The National Industrial Transportation League, National Rural Electric Cooperative Association, Nebraska Wheat Board, Oklahoma Wheat Commission, Portland Cement Association, South Dakota Wheat Commission, Texas Wheat Producers Board, The Fertilizer Institute, U.S. Clay Producers Traffic Association, And Washington Grain Commission, April 12, 2011.

industry today. They also explain why new regulatory policies that will encourage access to competitive rail service are warranted and why such changes will not destroy the robust financial health of the railroads.

The League incorporates by reference the Interested Parties' comments and supplements that filing by focusing here on the competition-enhancing policy changes that are most important to the diverse League membership. The policy changes strongly advocated by the League concern revenue adequacy determinations, expanded reciprocal switching and terminal trackage rights, and bottleneck rates. These requested policy changes are based on a survey and meeting of the League's Rail Transportation Committee.

II. STATEMENT OF INTEREST

The League is one of the oldest and largest national associations representing companies engaged in the transportation of goods in both domestic and international commerce. The League was founded in 1907, and currently has over 600 company members. These company members range from some of the largest users of the nation's and the world's transportation systems, to smaller companies engaged in the shipment and receipt of goods. The majority of the League's members include shippers and receivers of goods; however, third party intermediaries, logistics companies, and other entities engaged in the transportation of goods are also members of the League. The League's rail shippers are from a multitude of industries, including chemicals/petroleum, agricultural, forest products and paper, and steel, among others. Thus, the League has a very substantial interest in the issues presented by this proceeding.

III. RAIL COMPETITION HAS DECREASED DRAMATICALLY IN THE THIRTY YEARS SINCE PASSAGE OF THE STAGGERS ACT

It is very clear that rail-to-rail competition has decreased extensively since passage of the Staggers Act, thirty years ago. In 1980, there were over forty Class I railroads. Today, there are only seven Class I rail carriers, and of these seven, only four dominate the industry. These four carriers, BNSF Railway, Union Pacific Railroad, CSX Transportation, and Norfolk Southern Railway account for over 90% of Class I freight shipments and over 92% of the Class I railroads' $61 billion in revenues.[5] The dominance of these four carriers is increased by the fact that only two of them serve the eastern and two serve the western portions of the U.S, resulting in regional duopolies.

While the Board's approval of several major railroad mergers have brought incredible prosperity to the industry, the promise of vigorous competition among the remaining rail carriers has not been realized to the detriment of rail customers and the U.S. economy. Over time, the substantial loss of intramodal rail competition has allowed the remaining carriers to consciously avoid competition, except when it suits their own interest, and dramatically increase railroad rates year-after-year. Captive rail customers that have no other service and pricing options are forced to endure double-digit rate hikes and forgo service improvements and efficiencies. In its survey, League members reported that rates are 10-50% higher at captive facilities than at dual-served facilities.

The Updated Report by Lauritis R. Christensen Associates, Inc., *Description of the U.S. Freight Railroad Industry*, dated November 2009 ("Christensen Report"), noted that overall rail rates have been steadily increasing since 2004, with a particularly steep increase in 2008.[6] It also noted that real rail revenue per ton mile increased by 12 percent in just the two-year period between 2007-2008.[7] This trend, which suggests increasing market power relative to other

[5] Staff of S. Comm. on Commerce, Sci. & Transp., 111th Cong., *The Current Financial State of the Class I Freight Rail Industry* 3 (2010) (citing the Ass'n of Am. R.Rs. *Railroad Ten-Year Trends, 1999-2008* (Feb. 2010)) [hereinafter "Senate Financial Report"].
[6] Lauritis R. Christensen Associates, Inc., *A Study of Competition in the U.S. Freight Railroad Industry and Analysis of Proposals That Might Enhance Competition* i. (rev. 2009) (Executive Summary), http://www.lrca.com/projects/railroadstudy/ [hereinafter Christensen Competition Report].
[7] *Id.*

competitors, has been noted by others. For example, the Senate Financial Report, citing figures from a leading industry analyst (Wolfe Research), noted that since 2004, Class I railroads have been raising prices by an average of 5% a year above inflation, and that even during the recent recession, Class I railroads have been able to increase prices year-over-year, while the pricing of other freight modes has languished.[8] A very recent analysis of certain agricultural commodities indicates that, while in 1988 states with limited rail-to-rail competition and that were long distances from barge facilities paid the highest rail rates, by 2007 states with more nominal rail-to-rail competition and more competition from barge modes paid higher rail rates than the limited-competition states.[9] This suggests that alternative forms of competition are becoming increasingly weak.

A report from the Senate Committee on Commerce, Science, and Transportation ("Senate Financial Report") indicated that the rail industry has been able to regain its ability to raise prices on their <u>non</u>-captive customers, quoting one industry analyst as referring to this change as the industry's "pricing renaissance."[10] Industry analysts have noted the increasing pricing power of the rail industry. Recently, Wolfe/Trahan reported that "rail pricing continues to accelerate," with increases even in a traditionally motor-carrier-competitive commodity segment such as intermodal.[11]

The consolidation of the industry has also taken its toll on geographic competition, a result that was largely ignored in the agency's merger decisions in the 1990s. Shippers whose U.S. manufacturing facilities that used to be located on several railroads and who could threaten

[8] Senate Financial Report, *supra* note 5, at 8-9; see also, U.S. Dep't of Agric & U.S. Dep't of Transp., *Study of Rural Transportation Issues* viii, ix, 244 (2010) [herinafter DOA/DOT Ag Study].
[9] Prater, et. al, *Rail Competition Changes Since the Staggers Act*, 49 J. Transp. Research Forum No. 3 at 127 (Fall 2010).
[10] Senate Financial Report, *supra* note 5, at 8.
[11] Wolfe/Trahan, *Inside Freight*, October 4, 2010.

production shifts from one factory to another are now located on just one. The U.S. Department of Transportation and the U.S. Department of Agriculture have noted that the effectiveness of geographic competition has been substantially reduced as a result of mergers.[12] Moreover, in response to the League's survey on rail competition the vast majority of the respondents found that geographic competition was not effective in restraining rail rates.

The lack of sufficient competition is evidenced not only by substantially rising prices, but also by the railroads' ability to dictate contract terms to their customers. Although many shippers use rail contracts, the railroads often are unwilling to engage in meaningful negotiations with their customers. Instead, many shippers are presented contracts on a "take it or leave it" basis. When competition was more prevalent, rail contracts were true bilateral agreements, in which the shipper committed cargo volumes, the railroad provided service commitments, and the parties both negotiated liability and other terms. Today, many rail contracts look no different than a tariff, contain cancellation rights on 30-days notice, and are devoid of any service obligations. The railroads' refusal to negotiate and enter into mutual contract terms illustrates their dominant market position.

Further, despite rising rail rates, railroads are shifting more of their costs onto their customers to maximize their profits even further. Today, many more shippers furnish their own rail cars, handle the switching of cars at their plants, and may be made responsible for maintenance of certain rail infrastructure. The ability of the railroads to shed costs in areas of traditional railroad operations further demonstrates the exercise of the railroads' substantial market power and the lack of competitive alternatives.

These circumstances justify the Board changing its existing policies to create a more level playing field by providing rail customers greater access to competitive rail service.

[12] DOA/DOT Ag Study, *supra* note 5, at 206.

IV. THE RAILROADS ARE FINANCIALLY STRONG BUT THE BOARD'S REVENUE ADEQUACY STANDARDS FAIL TO REFLECT THEIR TRUE FINANCIAL HEALTH

It is beyond dispute that the railroad industry has been revitalized and has achieved incredible financial success in the past thirty years. Evidence of the railroads' strong financial condition is detailed in the Interested Parties' comments. However, despite the railroads' extremely strong financial condition, very few have been determined by the Board to be "revenue adequate."[13] This raises doubts over the utility of the current methodology used to measure railroad revenue adequacy. The League believes that the Board's calculus should be revised to more accurately measure the railroads' true financial health and to make determinations that are consistent with other independent assessments of the industry's financial condition.

The railroads' current robust financial health is in dramatic contrast to Congress' findings over thirty years ago that earnings by the railroad industry were the lowest of any transportation mode and were insufficient to generate funds for needed capital improvements. The recently issued Senate Financial Report concluded that "[a] review of the Class I railroads' recent financial results shows that the Staggers Act's goal of restoring financial stability to the U.S. rail system has been achieved."[14] The Senate Financial Report also found that the four largest U.S. rail carriers have nearly doubled their collective profit margin in the last ten years,[15] and that freight railroads are "now some of the most highly profitable businesses in the U.S. economy."[16]

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[13] *See* 49 U.S.C. § 10704(a)(2). Adequate revenues have been defined as "those that provide a railroad a rate of return on net investment equal to the current cost of capital." *Standards for Railroad Revenue Adequacy*, 364 I.C.C. 803 (1981), *aff'd sub nom, Bessemer & Lake Erie R. Co. v. United States*, 691 F.2d 1104 (3d Cir. 1982), *cert. denied*, 462 U.S. 1110 (1983).

[14] Senate Financial Report, *supra* note 5, at 1.

[15] *Id.* at 5.

[16] *Id.* at 14. The Christensen Competition Report concludes that in recent years the revenue of the freight railroad industry has exceeded industry costs, and thus the industry has thus achieved "revenue sufficiency." *See*,

In 2009, the railroads' profit margin placed the industry fifth out of 53 industries on *Fortune's* list of "most profitable industries."[17] Between 2001 and 2008, the railroad industry was ranked in the top ten on *Fortune's* profitability list seven out of eight times, and its growth in profitability had outpaced almost all other large industries.[18] All of this demonstrates that the railroads have achieved substantial prosperity since passage of the Staggers Act.

These findings have been confirmed by Wall Street's judgments. There has been strong investor interest in the freight railroad industry.[19] Indeed, nothing demonstrates the financial success of the railroads more than the purchase by Warren Buffett of the BNSF railroad in November 2009, in a deal valued at approximately $34 billion.[20]

Despite the overwhelming evidence of the railroads' financial renaissance, no railroads are currently considered to be revenue adequate by the Board,[21] and very few railroads have met the Board's current cost of capital standard in recent years. For example, in 2006, only three out of the seven Class I carriers were considered revenue adequate, and the simple average of the rates of return for all seven Class I carriers was 10.4%, or above the cost of capital for the rail industry for that year (9.94%).[22] In 2007, only two of the seven Class Is were revenue adequate, and the simple average of the rates of return for all seven Class Is was 10.7%, but the ROI

Christensen Competition Report, *supra* note 6, at 4-13. *See also*, Kelly Eakin, Lauritis R. Christensen Associates, Inc., Presentation to the Association of Transportation Law Professionals 9 (November 2010).

[17] Fortune, *Fortune 500 Top Performers: Most Profitable Industries*, http://money.cnn.com/magazines/fortune/fortune500/2009/performers/industries/profits/ (last visited April 11, 2011).

[18] Senate Financial Report, *supra* note 5, at 4-5.

[19] *Id.* at 5-8.

[20] Michael J. De La Merced, *Berkshire Bets on U.S. With a Railroad Purchase*, N.Y. Times, Nov. 3, 2009, http://dealbook.nytimes.com/2009/11/03/berkshire-to-buy-rest-of-burlington-northern-for-44-billion/.

[21] *R.R. Revenue Adequacy — 2009 Determination*, STB Docket No. EP 552 (Sub-No. 14), slip op. at 1 (served Nov. 10, 2010).

[22] *R.R. Revenue Adequacy — 2006 Determination*, STB Docket No. EP 552 (Sub-No. 11), slip op. at 1, 3 (served May 6, 2008).

standard calculated by the Board was 11.33%.[23] In 2008, during the beginning of the recession, just one carrier was revenue adequate, and in 2009 no carriers met the Board's ROI standard.[24] Accordingly, the League believes that the Board must review and revise its revenue adequacy methodology to ensure that such determinations reflect more accurately the railroads' robust financial health.

V. THE BOARD SHOULD REVISE ITS COMPETITIVE ACCESS AND BOTTLENECK POLICIES TO ENHANCE COMPETITION

The substantial loss of rail competition and the industry's financial transformation to substantial profitability justify action by the Board to ensure that its policies adequately facilitate competitive rail service and address long-standing concerns by captive shippers. Concerns over a lack of transportation options, substantial rate increases, and mediocre rail service have existed for many years. In 1998, the Board held hearings and conducted a review of rail access and competition issues, finding at that time:

> This increasing consolidation within the industry, combined with the difficulties that many shippers perceive in obtaining relief through the regulatory system, leave too many shippers feeling that they have no leverage and no avenue of relief. In short, the shippers charge that, eighteen years after passage of the Staggers Act, the regulatory system is not functioning as intended; what has resulted, they claim, is a highly concentrated rail industry that is generally pleased with the present regulatory scheme, and a group of rail dependent shippers, which our regulation is meant to safeguard, feels unprotected and broadly discontented.
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> Whether seeking better service, better prices, or both, dozens of rail-dependent shippers and their trade associations appeared at the hearings to voice those sentiments. . . . . The Board cannot ignore

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[23] *R.R. Revenue Adequacy — 2007 Determination*, STB Docket No. EP 552 (Sub-No. 12), slip op. at 1, 3 (served Sep. 26, 2008).

[24] *R.R. Revenue Adequacy — 2008 Determination*, STB Docket No. EP 552 (Sub-No. 13), slip op. at 1 (served Oct. 26, 2009); *R.R. Revenue Adequacy — 2009 Determination*, STB Docket No. EP 552 (Sub-No. 14), slip op. at 1 (served Nov. 10, 2010).

> the pleas of those many shippers that are concerned with the present state of affairs.[25]

Despite these long-standing concerns, very little has changed in the past thirteen years to address them. The exact complaints of shippers in 1998 continue to exist in 2011, except that rail pricing has ballooned even higher and railroads have accumulated greater wealth. The League believes that the Board should act now to address these concerns through revisions to its current competition policies. Based on its rail competition survey, League members strongly support changes to increase reciprocal switching and terminal trackage rights arrangements, and to overturn the Board's existing rule on bottleneck rates.

A. Expansion of Reciprocal Switching

As explained in detail in the Interested Parties' comments, the Board has ample legal authority and discretion to revise its policies to encourage greater competition through reciprocal switching. Congress provided the Board with broad authority to establish reciprocal switching arrangements "where it finds such agreements to be practicable and in the public interest, or where such agreements are necessary to provide competitive rail service."[26] The plain language of the statute provides wide discretion to the Board to establish switching arrangements, as long as they are "practicable", "in the public interest," <u>or</u> "necessary". Indeed, the legislative history of the Staggers Act specifically directed the agency to use reciprocal switching "to foster greater competition."[27]

Despite clear Congressional intent that reciprocal switching be established to counter-balance situations involving inadequate rail competition, no such arrangements have been established by the Board for decades. In fact, rather than "fostering competition" through

[25] *Review of Rail Access and Competition Issues*, 3 S.T.B. 92, 95 (1998).
[26] 49 U.S.C. § 11102(c).
[27] H.R. Rep. No. 96-1430, at 80 (1980) (Conf. Rep.).

reciprocal switching, the agency adopted competitive access rules and interpreted such rules in a manner which has in effect *foreclosed* the establishment of reciprocal switching arrangements, as a response to competitive concerns.

The agency's competitive access rules were adopted over 25 years ago in 1985.[28] Under those rules, the Board will establish reciprocal switching when such arrangement is "necessary to remedy or prevent an act that is contrary to the competition policies of 49 U.S.C. § 10101 or is otherwise anticompetitive," taking into account railroad revenue, routing efficiencies, operating costs, and rates, among other factors.[29] In the ten year period following their adoption, the agency applied the rules in a series of decisions, and denied relief in every case. In those decisions, the agency established incredibly high burdens of proof that have come to act as insurmountable barriers to establishing competition through reciprocal switching.[30]

The impediments created by the Board are detailed at pages 29-32 in the Interested Parties' comments but generally require a shipper to prove: "competitive abuse" through litigation of antitrust principles; market dominance, including the impact of geographic, but not product, competition; routing efficiency, including involved rates and operating costs; and/or severe service failures. Needless to say, these requirements involve highly complex analyses and intensive discovery, which are very complicated and expensive to litigate at the Board. The massive burdens of proof, denial of past relief, and substantial costs have deterred shippers from even attempting to establish reciprocal switching arrangements. This is directly contrary to the clear intent of Congress which expected such arrangements to be used to "foster competition."

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[28] *Intramodal Rail Competition,* 1 I.C.C.2d 822, *aff'd sub nom Baltimore Gas & Elec. Co. v. United States,* 817 F.2d 108, 114 (D.C. Cir. 1987).
[29] 49 C.F.R. § 1144.2(a)(1).
[30] *Midtec Paper Corp. v. Ch. & N.W. Transp. Co.*, 3 I.C.C.2d 171 (1986); *Vista Chemical Co. v. Atchison, Topeka & Santa Fe Ry.*, 5 I.C.C.2d 331 (1989); *Shenango, Inc. v. Pittsburgh, C & Y Ry.*, 5 I.C.C.2d 995 (1989), *aff'd sub nom. Shenango, Inc. v. ICC*, 904 F.2d 696 (3d Cir. 1990); *Golden Cat Div. of Ralston Purina Co. v. St. Louis Sw. Ry.*, ICC Docket No. 41550 (served Apr. 25, 1996).

Accordingly, the League believes that the STB should initiate a proceeding expeditiously after the June 22 hearing to revise its competitive access rules. As noted, the Board has the authority to facilitate greater competition through reciprocal switching, as intended by Congress. The Board also maintains considerable discretion to revise its current rules and should do so based on changes in the structure and operations of the rail industry and long-standing calls for greater competition from captive shippers.

The League has not yet determined what specific changes should be adopted by the Board in any future proceeding involving revisions to the current competitive access rules. However, it has begun and will continue to discuss such issues during the pendency of this proceeding. At this point, the League can state generally that the Board must simplify the burdens of proof that are currently required to establish reciprocal switching and align them more closely with the statute's public interest requirements. The League believes that the Board must create new reciprocal switching rules that are much less complex and costly to administer, and that can be utilized to address existing competitive concerns.

League members with facilities in Canada have benefited from that country's inter-switching provisions and found the Canadian rules to offer a simpler and more cost-effective approach to establishing switching arrangements. The Canadian switching model has generally worked to promote competition between railroads without requiring lengthy, complicated, and costly legal proceedings.

Under the Canadian rules, a shipper may obtain switching access to a second rail carrier that operates at a terminal that is within a radius of 30 kilometers of the shippers' facility, and the Canadian statute establishes the rate to be charged for the switching service.[31] Inter-switching has allowed the Canadian facilities of U.S. companies to compete more effectively than their

[31] Railway Interswitching Regulations (Canada Transportation Act) SOR/1988-41 (Can.).

facilities in the U.S. that lack competitive options. Moreover, the Canadian railroads have prospered just like the U.S. railroads and, thus, the inter-switching rules have not caused their financial ruin. This fact is in stark contrast to the unfounded fears of the U.S. rail carriers, should a similar system be employed in the U.S. In fact, in its Report, Christensen Associates, Inc. concluded that expansion of reciprocal switching arrangements would not be detrimental to the rail industry: "[w]e believe that incremental policies such as reciprocal switching and terminal agreements have a lower potential of leading to adverse changes to industry structure, costs, and operations, and additionally have greater likelihoods of resolving shipper concerns via competitive market responses."[32]

The League is cognizant that the Canadian switching model could not be adopted wholesale in the United States, based on our current statutory structure, and it does not advocate for switching rules that replicate the Canadian system verbatim. However, the League believes that new switching rules are essential to fulfilling the pro-competitive mandate in Staggers, and that such new rules should include realistic standards that relate specifically to the broad statutory requirements that switching arrangements be "practicable and in the public interest" or "necessary to provide competitive rail service."[33]

Another relevant factor is that switching arrangements should be permitted at a wide-range of terminal locations. This will help address the fact that in order for competition to truly exist access to a second carrier must be established at both the origin and destination. If either point remains captive, the incumbent railroad is typically able to prevent the alternative carrier from serving as a meaningful competitive option.

[32] 3 Christensen Competition Report, *supra* note 6, at 22-14.
[33] 49 U.S.C. § 11102(c).

Even if reciprocal switching arrangements can be established more broadly, the level of the switching rate remains a serious issue. Railroads can defeat competition and effectively close a switching service simply by establishing fees that are uneconomic. The Board should consider establishing switching fee standards that avoid the requirement to litigate a rate case every time a fee is considered to be unreasonably high. The League believes that alternatives should be considered, such as capping R/VC ratios or providing automatic relief if R/VC ratios reach a defined level. A more simplistic and straightforward approach to addressing switching rate levels would be consistent with the public interest.

B. Terminal Trackage Rights

A revision to the Board's competitive access rules should also encompass terminal trackage rights arrangements. As with reciprocal switching, the Board has ample legal authority and broad discretion to change the standards currently applied to terminal trackage rights. The statutory requirements for these arrangements are the same as those for reciprocal switching, except that trackage rights also must not "substantially impair the ability of the rail carrier owning the facilities or entitled to use the facilities to handle its own business."[34] This added requirement can be explained by the more invasive nature of the access via trackage rights, which permit a second carrier to physically operate over the incumbent carrier's tracks. However, even with this supplemental showing involving railroad operations, there is no restraint on the Board's authority or discretion to revise *its own rules and precedent* to facilitate rail competition, consistent with the statute.

While the League believes that reciprocal switching should be favored over trackage rights arrangements where feasible, it also believes that the problems with the Board's current competitive access rules apply with the same force to terminal trackage rights. The same

[34] 49 U.S.C. § 11102(a).

excessive burdens of proof are required and no shipper has obtained trackage rights under the Board's rules since they were first adopted in 1985. Thus, a future proceeding to revise the Board's existing competitive access standards should be comprehensive in scope to include terminal trackage rights arrangements.

C. The Board's Bottleneck Rule Should be Overturned

In its Notice, the Board also asked whether it could and should change its precedent regarding bottleneck rates.[35] Currently, a railroad is not required to quote a rate on a bottleneck segment, unless the shipper first obtains a contract from the carrier that operates over the non-bottleneck segment.[36] It has long been held that a regulatory agency can revise its policies, as long as it specifies the reason for the change.[37] Further, a change in policy may occur without a change in circumstances.[38] Thus, the Board has the flexibility and discretion to overturn its bottleneck decisions even if no changes have occurred in the rail industry since those decisions were issued. As further explained in the Interested Parties' comments, there is no legal barrier that prevents the Board from changing its nearly fifteen year old bottleneck precedent to foster greater rail competition.[39]

Not only can the Board change its bottleneck policy, it should change this policy in order to increase the competitive options available to captive rail customers. The Board's current policy sanctioning bottleneck rate refusals prevents shippers from taking advantage of *existing* rail competition at an origin or destination. Unfortunately, today, the benefits of such *existing* competition are never realized because the bottleneck carrier is allowed to avoid its common

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[35] *Competition*, STB Docket No. EP 705, at 5 (served Jan. 11, 2011).
[36] *Cent. Power & Light v S. Pac.*, 1 S.T.B. 1059 (1996), *clarified*, 2 S.T.B. 235 (1997), *aff'd sub nom, MidAmerican Energy Co. v. STB*, 169 F.3d 1099 (8th Cir. 1999).
[37] *Motor Vehicle Manufacturers Ass'n v. State Farm*, 463 U.S. 29, 58 (1983).
[38] *BNSF Ry. v. STB*, 526 F.3d 770, 779-80 (D.C. Cir. 2008)
[39] Comments of Interested Parties 44-46.

carrier obligation as to the bottleneck segment and, thereby, prevent the shipper from using combined rates (over the bottleneck and non-bottleneck segments) to compete with a single-line rate from solely the bottleneck carrier. Although the railroad is required under its common carrier obligation to quote a rate on reasonable request,[40] the Board previously determined that this fundamental principle in the statute did not apply if it would require a bottleneck carrier to forgo its long-haul.[41]

This policy should be reversed to allow shippers greater choices in rail carriers and access to potentially more efficient routings. The rule that is more consistent with the pro-competitive Staggers Act policies is that the railroads' common carrier obligation should apply to bottleneck situations to permit the benefits of existing competition to be realized. However, the Board's current bottleneck policy ensures that this competition is foreclosed and permits the incumbent railroad to extract monopoly rates across the entire origin to destination movement. Thus, the Board's current bottleneck policy forces shippers to rely on complex and costly rate reasonableness regulation and litigation to constrain rail pricing, as opposed to existing competition.

VI. INCREASING RAIL COMPETITION WILL RESULT IN GREATER PUBLIC BENEFITS

The higher transportation costs and reduced efficiencies experienced by captive rail shippers negatively impact their competitiveness in today's global economy. Annual increases in rail rates, in some cases in the double digits, cannot simply be passed through to customers. Foreign competition from China, India, and other countries makes it harder for U.S. businesses to grow and flourish when they must continually accept rising rail rates and inefficient service. Further, captive shippers are faced with difficult choices when deciding whether to increase

[40] 49 U.S.C. § 11101(a).
[41] *Cent. Power*, 1 S.T.B. at 1064.

investment in facilities or to pursue new business opportunities, due to the substantial lack of control over transportation costs. Providing greater access to competitive rail service will help ensure that companies maintain their facilities in the United States, invest in new plants and infrastructure, and create jobs here at home.

In order to remain competitive in their own industries, rail dependent businesses must have an ability to transport their goods efficiently and economically. The current market structure and regulatory policies, however, prevent many companies from achieving this necessity. Thus, as requested herein, the Board should revise its policies to foster greater competition, which will result in more reliable, efficient, and reasonably priced transportation services with ensuing benefits to the U.S. economy.

VII. CONCLUSION

The League appreciates that opportunity to make its views known to the Board in this very important proceeding. For the foregoing reasons, the League believes that the Board should take prompt action after the hearing on June 22 to change it policies to provide U.S. businesses with greater access to competitive rail service. Specifically, the Board should open new proceedings to revise its existing competitive access rules, which have utterly failed to be an effective tool for addressing competitive concerns. The agency should overturn its bottleneck rule, which has prevented shippers from accessing existing competition. The Board should also undertake to revise its revenue adequacy methodology in order to measure more accurately the railroads' robust financial health. Changes in these areas are essential to alleviating the adverse effects of insufficient competition imposed on captive shippers and in fulfilling the pro-competitive mandate in the Staggers Act to allow competition to establish reasonable rail rates and conditions "to the maximum extent possible."

Respectfully submitted,

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